

VIOLATION OF A HARASSMENT PREVENTION ORDER

The defendant is charged with knowingly violating a harassment prevention order issued by a court. Section 9 of chapter 258E of our General Laws provides, in substance, that it is unlawful to violate an order issued pursuant to that chapter which orders the defendant:

(to refrain from abusing or harassing the person who requested the order)

(or) (to refrain from contacting the person who requested the order unless authorized by a court);

(or) (to stay a particular distance away from the person who requested the order);

(or) (to remain away from the household of the person who requested the order);

(or) (to remain away from the work place of the person who requested the order).

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That a court had issued an order pursuant to chapter 258E of**

our General Laws which ordered the defendant:

(to refrain from abusing or harassing [name of plaintiff]);

**(or) (to refrain from contacting [name of plaintiff] directly or indirectly
unless authorized by a court);**

(or) (to stay a particular distance away from [name of plaintiff]);

**(or) (to remain away from the household or multiple family dwelling of
[name of plaintiff]);**

**(or) (to remain away from the workplace of [name of plaintiff]
[located at [address]]);**

***Second:* That such order was in effect on the date when its violation
allegedly occurred;**

***Third:* That the defendant knew that the pertinent term(s) of the order
(was) (were) in effect, either by having received a copy of the order or by
having learned of it in some other way;**

and *Fourth:* That the defendant violated the order by:

(abusing or harassing [name of plaintiff]);

**(or) (contacting [name of plaintiff] directly or indirectly unless authorized
by a court);**

(or) (failing to stay a particular distance away from [name of plaintiff]);

(or) (failing to remain away from the household or multiple family dwelling of [name of plaintiff]);

(or) (failing to remain away from the workplace of [name of plaintiff] [located at [address]]).

Here the jury must be instructed on “Knowledge” (Instruction 3.140).

SUPPLEMENTAL INSTRUCTIONS

1. “Abuse.” By “abuse” the law means:

(causing or attempting to cause another person physical harm);

(or) (placing another person in fear of immediate serious physical harm);

G.L. c. 258E, § 1.

2. “Harass.” By “harass” the law means:

(a willful or malicious act aimed at [name of plaintiff] committed with the intent to cause fear, intimidation, abuse or damage to property);

(or) (an act that by force, threat or duress causes another to involuntarily engage in sexual relations;

(or) (an act that constitutes the crime of:

(indecent assault and battery on a child)

(indecent assault and battery on a mentally retarded person)

(indecent assault and battery)

(rape)

(forcible rape of a child)

(statutory rape)

(assault with intent to rape)

(assault with intent to rape a child)

(enticement of a child)

(criminal stalking)

(criminal harassment)

(drugging for sexual intercourse).

A person acts willfully if he (she) intends both the conduct and its harmful consequences.

A person acts maliciously if the act is characterized by cruelty, hostility or revenge.

G.L. c. 258E, § 1.

The supplemental instructions, citations and notes that follow arose under G.L. c. 209A. They appear to be relevant to cases arising under G.L. c. 258E, but have not been so held.

3. *Accidental contact.*

If there is evidence suggesting that the alleged contact may have occurred by accident because the defendant did not have reason to know or believe that [name of plaintiff] would be present at that time or place, then the Commonwealth must prove beyond a reasonable doubt that the alleged violation did not arise by accident, unknowingly, or through inadvertence. An accident is an unexpected happening that occurs without intention or design on a person's part.

The Commonwealth is not required to prove that the defendant intended to violate the harassment prevention order. It must prove only that he (she) intended the act which would

constitute a violation.

But if the evidence raises the possibility that a defendant violated an order either by accident, unknowingly or inadvertently, the Commonwealth must disprove that possibility by proof beyond a reasonable doubt.

If the Commonwealth has proved beyond a reasonable doubt each element of the offense and has also proved beyond a reasonable doubt that the violation was not committed by accident, unknowingly, or through inadvertence, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the violation was accidental, unknowing or inadvertent, you must return a verdict of not guilty.

If a person subject to a restraining order happens upon a protected person whom he or she did not and could not reasonably know to be present at that time and place, the party subject to the order must make reasonable efforts to terminate the accidental encounter. *Commonwealth v. Stoltz*, 73 Mass. App. Ct. 642, 900 N.E.2d 880 (2009). When there is evidence that fairly raises the issue of accident, the burden falls on the Commonwealth to disprove it. *Commonwealth v. Zezima*, 387 Mass. 748, 756, 443 N.E.2d 1282 (1982); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 583, 571 N.E.2d 411 (1991) ("Where the evidence raises the possibility of accident, the defendant is, as matter of due process, entitled upon request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental").

See notes to Instruction 9.100 (Accident).

4. *Incidental contact.* If there is evidence that suggests that the alleged contact may have been incidental to a legitimate, lawful activity such as (e.g., contacting a child, going to work, going to school), then the Commonwealth must prove beyond a reasonable doubt that the alleged violation was not incidental to that permitted activity. Conduct that is incidental to legitimate, lawful activity is conduct which is connected to that activity — conduct which is purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.

So, for example, if a person subject to a harassment prevention order waited in the only public hallway of a courthouse for the start of a hearing, and the person protected by that order was waiting somewhere else in that same public hallway, that conduct would be incidental to a legitimate, lawful activity — attending the court hearing. Although there might be a stay away order in effect, there would be no violation of that order because the conduct was purely a natural and reasonable

outgrowth of the scheduling of the hearing.

On the other hand, if the subject entered the public hallway and intentionally stood directly next to the plaintiff when the subject could have stood elsewhere, that would violate the order because it was not incidental or necessary to the lawful activity.

The Commonwealth may prove that the defendant's conduct was not incidental to a lawful activity by proving that the alleged violation was not purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity. Put another way, the Commonwealth must prove that the defendant's conduct was not a good faith attempt by the defendant to do that which was permitted.

In deciding whether there was any contact which violated the harassment prevention order, you may consider any evidence relevant to: (1) the nature and purpose of any contact; (2) the number of contacts over time; (3) the length of any contact; and (4) the substance and character of any statements made during any contact.

You should consider all the evidence in the case to decide

whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party, [name of plaintiff] .

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also proved beyond a reasonable doubt that the violation was not committed incidental to a legitimate, lawful activity, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the contact(s) was (were) not incidental to a legitimate, lawful activity, you must return a verdict of not guilty.

Commonwealth v. Silva, 431 Mass. 194, 726 N.E.2d 408 (2000); *Commonwealth v. Consoli*, 58 Mass. App. Ct. 734, 738, 792 N.E.2d 1007, 1010-1011 (2003); *Commonwealth v. Stewart*, 52 Mass. App. Ct. 755, 756 N.E.2d 22 (2001); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 752 N.E.2d 799 (2001); *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684, 687 n.8, 740 N.E.2d 799 n.8 (2001).

5. Violation through third party.

If there is evidence that the conduct by which the defendant is alleged to have violated the harassment prevention order resulted from the action of a third person, the Commonwealth must prove beyond a reasonable doubt that the

defendant had an intent, or shared an intent with the third person, to do an act that could result in a violation of that order. The defendant is not guilty unless he (she) had such an intent or shared intent. The defendant cannot be found guilty for an act of another person which he (she) did not intend and over which he (she) had no control.

The Commonwealth is not required to prove that the defendant specifically intended to violate the harassment prevention order. It is required only to prove that the defendant intended, or shared an intent with the third party, that an act be done which violated the order.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the defendant had an intent or shared intent with a third person to do an act that could result in a violation of a harassment protection order, you should return a verdict of guilty. If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense or failed to prove beyond a reasonable doubt that the defendant intended or shared the intent of a third party to commit such an

act, you must return a verdict of not guilty.

If appropriate, here instruct on inferences (Instruction 3.100).

Commonwealth v. Collier, 427 Mass. 385, 389, 693 N.E.2d 673, 676 (1998) (where act constituting violation was committed by third party, Commonwealth must prove act was intended by defendant but not that defendant intended to violate order). See also *Commonwealth v. Russell*, 46 Mass. App. Ct. 307, 705 N.E.2d 1144 (1999).

NOTES INVOLVING G.L. c. 209A CASES:

1. **Attempted physical harm requires overt act.** The nature of an attempt to cause a person physical harm, “like criminal attempt, is predicated on an unsuccessful but affirmative effort at commission of the underlying offense.” *Commonwealth v. Fortier*, 56 Mass. App. Ct. 116, 775 N.E.2d 785 (2002). “Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd.” *Fortier* at 122, citing *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21, 48 N.E. 770, 770-771 (1897).

2. **Service or knowledge of extended order.** A defendant may be prosecuted for violating a G.L. c. 209A abuse prevention order that was extended unchanged after a “10-day” hearing, despite not being served with the extended order, if he had been served with the prior ex parte temporary order, which provided sufficient notice that his failure to attend the scheduled hearing would result in the continuation of the temporary order by operation of law. *Commonwealth v. Delaney*, 425 Mass. 587, 682 N.E.2d 611 (1997). However, the same is not true of successive annual extensions of the order; failure to serve a copy of the current extended order is fatal where there have been successive annual extensions unless the Commonwealth proves constructive knowledge of the extension. *Commonwealth v. Molloy*, 44 Mass. App. Ct. 306, 690 N.E.2d 836 (1998).

3. **Intent to violate order.** General Laws c. 209A does not require any specific mens rea or intent to violate the abuse prevention order, merely knowledge of and violation of the order. *Commonwealth v. Delaney*, 425 Mass. 587, 682 N.E.2d 611 (1997).